



# **Straight Talk About Takings**

**Max B. Walton**  
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**CONNOLLY BOVE LODGE & HUTZ LLP**  
ATTORNEYS AT LAW

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# Takings Claims are Constitutional

- U.S. Constitution – Fifth Amendment – private property shall not be “taken for public use, without just compensation”
- Delaware Constitution, Article I, Section 8 – no person’s property “shall be taken or applied to public use without the consent of his [or her] representatives, and without compensation being made”
- **Reason:** Private individuals should not bear public burdens



# Two Types of Takings

1. Physical Takings
2. Regulatory/De Facto Takings



# Physical Takings

- When the government physically takes possession of land for some public purpose, it has a duty to compensate the owner
- If there is a permanent physical invasion, it is a “per se” taking and a duty to compensate arises



# Physical Taking Examples

- State condemnation for roads and rights-of-way
- Appropriation of a rooftop to an apartment building for cable TV access
- Airspace to approach a government airport



# Several Delaware Agencies Have the Power to Take Land for Specific Public Purposes

- DeIDOT
- DNREC (7 *Del. C.* § 6613; 7 *Del. C.* §7009)
- Counties and Municipalities
- Tax Ditches (7 *Del C.* § 4161)
- Department of Education (14 *Del. C.* § 2303)



## Several Delaware Agencies Have the Power to Take Land for Specific Public Purposes Cont'd

- University of Delaware (14 *Del. C.* § 5114)
- Parking Authorities (22 *Del. C.* § 504)
- Office of Management and Budget (29 *Del. C.* § 405)



# DeIDOT's Authority to Take

- Necessary power to take for public improvements
- DeIDOT is afforded “broad deference” in deciding how much property is required for a public improvement
  - *State v. Amin*, 2007 WL 1784187 (Del. Super. Ct.)
- DeIDOT may take lands for wetlands mitigation
  - *Cannon v. State*, 807 A.2d 556 (Del. 2002)
- DeIDOT even has the power to take private land for improvements to benefit proposed development
  - 17 Del. C. § 507





# Slum Clearance

- Municipalities and government agencies have the power to take land for slum clearance in blighted areas
  - Title 31, Chapter 45
- Delaware courts have held the ability for slum clearance is constitutional
  - *Randolph v. Wilmington Housing Auth.*, 139 A.2d 476 (Del. 1958)
- Municipalities that take land for slum clearance must follow specific procedures and make specific findings before the land can be taken
- Current City of Wilmington case may be the test case for the power of the City to take for slum clearance and blighted areas



# Limitations on Takings Power

- Delaware law is more conservative than other states with respect to condemnation power
- Delaware has held that the public use limitation for takings means the agency must take for a public purpose
- In the *Libby's* case, the Court held that the Wilmington Parking Authority could not condemn Libby's restaurant so that parking could be reserved for The News Journal
  - *Wilmington Parking Authority v. Wilmington Land With Improvements*, 521 A.2d 227 (Del. 1987)



# Other Limits on the Takings Power - 29 Del C. § 9505 (15)

- In 2005, the General Assembly passed two statutes that limit the ability of the government to take property, even for a public purpose.
- In 29 Del C. § 9503 (15), the General Assembly required that acquisition of real property through the exercise of eminent domain by any agency shall be undertaken, and the property used, only for the purposes of a recognized public use as described at least six months in advance of the institution of condemnation proceedings:
  - a. In a certified planning document;
  - b. At a public hearing held specifically to address the acquisition; or
  - c. In a published report of the acquiring agency.



# Other Limits on the Takings Power - 29 Del C. § 9503

- The second bill amends 29 Del. C. § 9503, and provides that:
  - Where a condemnation proceeding is instituted by the agency to acquire real property for such use and the final judgment is that the real property cannot be acquired by condemnation or the proceeding is abandoned, the owner of any right, title or interest in such real property shall be paid such sum as will, in the opinion of the court, reimburse such owner for reasonable attorney, appraisal and engineering fees, actually incurred because of the condemnation proceedings. The awards of such sums will be paid by the agency.



# Regulatory Takings/De Facto Takings

- When regulation without physical entry causes a compensable taking
- Occurs when government directly and substantially interferes with a property owner's rights
- There is no "per se" test to establish what constitutes a regulatory taking
- When a regulation "goes too far" it constitutes a regulatory taking - ad hoc inquiry into the facts
- Regulation that does not deny all economically viable use of the land generally passes the takings test



# Salem Church Test for Regulatory Takings

- Test:
  - Reasonable investment backed expectations vs.
  - Character of the governmental action vs.
  - The economic impact of the regulation on the claimant
- Ultimately the Court weighs and balances the private and public interests



# What is not a Taking

- Diminution in property value
- A moratorium of a reasonable duration
- Ordinance preventing excavation below the water table that stops an existing use
- Mere flux in value during governmental decision making processes is an incident of ownership and is not considered a taking



# What is not a Taking, cont.

- Bans uses of portions of an owner's property
- Downzoning
- One to five units permitted on a five acre tract
- Rezoning from industrial to agricultural
- Development density limits for lack of municipal services





# What is a Regulatory Taking?

- Requiring a public easement across land as a condition for a permit
- Destruction of rights reserved to mine coal
- Requiring exactions that do not have a rough proportionality or nexus with the application
- Need to deny virtually all viable uses before a regulatory takings claim is successful



# How Regulatory Takings Claims are Heard

- Party asserting a takings claim is generally required to exhaust all local administrative remedies first
- Usually must exercise state court remedy before asserting a federal cause of action

